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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT BROWN, Defendant and Appellant.	B292169 (Los Angeles County Super. Ct. No. BA160163)

APPEAL from a judgment of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Nicholas J. Webster, and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION AND BACKGROUND

In 1999 a jury convicted defendant Robert Brown of violating former Penal Code section 12020, subdivision (a), carrying a concealed dirk or dagger.[1] Based upon findings that Brown had multiple prior convictions for robbery, the court sentenced him to 25 years to life, in accordance with the "Three Strikes" law. In December 2012, Brown filed a petition for recall of his sentence under Proposition 36, which provides for relief from indeterminate life sentences under the Three Strikes law for inmates currently serving sentences for nonviolent, nonserious felonies. (§ 1170.126, subd. (b); see § 1170.12.) After briefing and a hearing on the issue, the court determined Brown ineligible for such resentencing because he was armed with a deadly weapon—namely, the unsheathed six-inch double-bladed knife, or "dagger," on which his conviction was based during the commission of the underlying offense. Because being "armed with a . . . deadly weapon during the commission" of the third-strike offense renders a defendant ineligible for Proposition 36 sentencing reduction, the court denied Brown's petition. (See §§ 1170.126, subd. (e)(2); 1170.12, subd. (c)(2)(C)(iii).) Brown timely appealed that denial. On appeal, he argues that the trial court's interpretation of section 1170.126, although accepted by numerous appellate courts, is incorrect, because it would render every conviction under section 21310 ineligible for sentence reduction, which Brown contends is inconsistent with the intent and language of Proposition 36. We

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[1] The crime is now codified in Penal Code section 21310. For ease of reference, however, we refer to the section number that applied at the time of Brown's conviction (section 12020). Unless otherwise indicated, all other statutory references are to the Penal Code.

disagree. The statutory language is unambiguous in requiring the result reached by the trial court, a result that is consistent with the voters' intent in passing the initiative. We therefore affirm.

STANDARD OF REVIEW

Brown's arguments involve the interpretation of Proposition 36, and thus present issues of statutory interpretation. (See *People v. Canty* (2004) 32 Cal.4th 1266, 1276 ["In interpreting a voter initiative such as [a proposition], we apply the same principles that govern the construction of a statute."].) We review such issues de novo. (See *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1232.)

DISCUSSION

After the enactment of Proposition 36, an inmate serving a third-strike sentence for a nonserious and nonviolent felony may be eligible for reduction in his or her sentence under section 1170.126, subdivision (e). (§ 1170.126, subd. (e).) An inmate is statutorily ineligible for such resentencing, however, if the third-strike offense is one of several crimes section 1170.126, subdivision (e) specifically identifies as ineligible, or if any of the general ineligibility criteria also listed in that section are present. (See §§ 1170.126, subd. (e)(2), 1170.12, subd. (c)(2)(C).) These general ineligibility criteria include, inter alia, that "[d]uring the commission of the current offense, the defendant . . . was armed with a firearm or deadly weapon." (§§ 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).) " ' "[A]rmed with a firearm" [or weapon] has been statutorily defined and judicially construed to mean having a firearm [or weapon] available for use, either offensively or defensively. [Citations.]' [Citation.] It is the availability of and ready access to the weapon that constitutes arming." (*People v. Cruz* (2017) 15 Cal.App.5th 1105, 1109–1110.)

In order to violate section 12020, the defendant must carry the deadly weapon concealed "upon his or her person." (*People v. Rubalcava* (2000) 23 Cal.4th 322, 332, quoting former § 12020, subds. (a) & (c)(24).) A dirk or dagger is a "deadly weapon[] as a matter of law." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1029 (*Aguilar*) ["the ordinary use for which they are designed establishes their character as such"].) Thus, a defendant is necessarily armed with a deadly weapon during the commission of this offense, rendering all section 12020 violations categorically ineligible for Proposition 36 resentencing. (See §§ 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).)

Brown disputes this interpretation of Proposition 36, arguing that if the voters had intended Proposition 36 to have such an effect, they would have listed a violation of section 12020 as a disqualifying factor in and of itself, just as they did with certain controlled substance and sex offenses. (See §§ 1170.12, subd. (c)(2)(C)(i).) This argument suggests we focus solely on the absence of section 12020 in the list of specifically enumerated ineligible offenses identified in section 1170.26, subdivision (e)(2), and ignore the general disqualifiers that same subdivision identifies as a basis for ineligibility. But " '[s]tatutory language should not be interpreted in isolation.' " (See *People v. Briceno* (2004) 34 Cal.4th 451, 460.) Instead, we must interpret it " 'in the context of the entire statute of which it is a part, in order to achieve harmony among the parts.' " (*Ibid.*) After doing so, we are not persuaded that the voters' decision not to include section 12020 violations in the list of specific ineligible offenses means such violations cannot be categorically ineligible if they meet other ineligibility criteria in Proposition 36. "Apparently recognizing the *maxim expressio unius est exclusio alterius*—the expression of some things in a statute necessarily means the exclusion of other things not expressed [citation]—voters rendered ineligible for resentencing not only

narrowly drawn categories of third-strike offenders who committed particular, specified offenses or types of offenses, but also broadly inclusive categories of offenders who, during commission of their crimes—and regardless of those crimes' basic statutory elements—used a firearm, were armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1036 (*Osuna*).) Finally, the fact that the arming ineligibility factor may entirely duplicate an element of the underlying crime is not in itself problematic, because section 1170.126 does not impose additional punishment, but rather permits a possible reduction in punishment. (*Osuna*, *supra*, 225 Cal.App.4th at p. 1040; cf. *People v. Ahmed* (2011) 53 Cal.4th 156, 161–162, fn. 2, 163 [enhancements "focus on *aspects* of the criminal act that are not always present and that warrant additional punishment"].)

Brown next urges this court to interpret "armed . . . during the commission of the current offense" to require "that the arming and the offense be separate, but 'tethered,' such that the availability of the weapon facilitates the commission of the offense." But, in the related context of Proposition 36 petitions regarding firearm possession offenses, courts have universally rejected interpretations of the phrase "during the commission" that require a facilitative nexus. (See, e.g., *People v. Brimmer* (2014) 230 Cal.App.4th 782, 797–799 (*Brimmer*); *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312–1313 (*Elder*); *Osuna, supra,* 225 Cal.App.4th at pp. 1030–1031.) These cases considered and correctly rejected arguments that, like Brown's, draw an analogy to case law construing the phrase "armed [with a firearm] '*in the commission of*' a felony"—not "*during* the commission" of a felony—in the context of firearm sentencing enhancements. (*Osuna, supra*, 225 Cal.App.4th at p. 1032, italics added; see *Brimmer, supra*, 230 Cal.App.4th at pp. 794–795; accord, *People v. Bland* (1995)

10 Cal.4th 991, 1001–1003.) They conclude that the voters' decision to use "during" is significant, because " '[d]uring' is variously defined as 'throughout the continuance or course of' or 'at some point in the course of,' " so it requires nothing beyond temporal connection. (*See Osuna*, *supra*, 225 Cal.App.4th at p. 1032; see also *Elder, supra*, 227 Cal.App.4th at pp. 1312–1313 [noting "illogic" of conflating enhancement provision with Proposition 36's ineligibility provision].) We may assume that the voters consciously chose this language, and agree with the logic of these firearm possession decisions.

Brown counters that these cases do not dictate the result here, because the arming is not a necessary element of a firearm possession offense the way it is for a section 12020 violation; that is, a person may possess a firearm constructively, without having ready access to it, but cannot carry a concealed dirk or dagger without having ready access to it. But the interpretation of section 1170.26 in *Osuna* and other firearm possession cases discussed above relies primarily—and correctly—on the plain and unambiguous language of that section, not the extent to which the ineligibility factor overlaps with the underlying offense. (See *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1053 ["[w]hen the language is clear and unambiguous, there is no need for construction" and the court need not look to "extrinsic aids"].)

Brown also argues that the trial court's interpretation of section 1170.26 is inconsistent with the voters' intent in passing Proposition 36. The literal language of a statute should not prevail if it conflicts with the lawmakers' intent. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) This is not the case here. Proposition 36 sought to give lesser sentences to less dangerous felons, while assuring truly dangerous felons were kept behind bars. (*People v. Johnson* (2015) 61 Cal.4th 674, 689–695.) It undertook to achieve this by rendering ineligible for release

felons who remain a threat to public safety. (*Ibid.*) A third-time felon in possession of a concealed dirk or dagger—a weapon that is deadly "as a matter of law"—*does* pose a risk to the public. (*Aguilar, supra,* 16 Cal.4th at p. 1029.) That Brown is ineligible for Proposition 36 relief is thus wholly consistent with the voters' intent. Brown also implies that, because carrying a concealed dirk or dagger is a "wobbler" offense, punishable as either a felony or a misdemeanor, a person convicted of that offense cannot be so dangerous as to be categorically ineligible for resentencing. But Brown was not convicted of a misdemeanor violation of section 12020; had he been, the offense would not have been sentenced under the Three Strikes law in the first place and would not fall within the purview of section 1170.126. (§ 1170.126, subd. (b).)

Thus, taking the statute's plain language to mean what it says—that a felon being armed with a dangerous weapon at the time he committed a third-strike offense renders that offense ineligible for resentencing—is wholly consistent with Proposition 36's intent. We need look no further to conclude that the trial court correctly found Brown ineligible for recall under section 1170.126, subdivision (b), based on his having been armed with a deadly weapon during the commission of the underlying offense of carrying a concealed dirk or dagger, even though being so armed is a necessary element of that underlying offense.

DISPOSITION

The trial court's order is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

BENDIX, J.